IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.944 OF 1998
IN
CHAMBER SUMMONS NO.1670 OF 1997
IN
SUIT NO.4542 OF 1995

1a. Sadhana Arun Kothari,)

1b. Aayush Arun Kothari,)
both having their Office)
At 5, Jai Hind Building,)
106 Nagindas Master Road,)
Fort, Mumbai - 400 023.)

2. Arvind Son of Ganpatlal)
Kothari, having his office)
Block 5, Jai Hind Bldg.,)
106 Nagindas Master Road,)
Fort, Bombay - 400 023.).. Appellants
(Org.Plaintiffs)

Versus

1. Mrs. Raj Bhalla wife of)
Shri D.N.Bhalla,)
residing at 5, Babar Road,)
New Delhi Pin 11 00 11.).. Respondent
(Org.Defendant)

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Ms Ramaiya Mahesh i/b Shri K.K.Tated for the appellants.

Shri A.D.Kango for the respondent.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 4TH JUNE, 2007

JUDGMENT: (Per R.M.S.KHANDEPARKAR, J)

1. Heard. The present appeal arises from the judgment dated 14th August, 1998 passed by the Learned Single Judge in Chamber Summons No.1670 of 1997 in Suit No.4542 of 1995. By the impugned order, the Learned Single Judge has allowed the chamber summons taken out by the respondent, who was defendant No.1 in the suit, for revoking the leave granted under Clause XII of the Letters Patent on 17th November, 1995 to the appellants/plaintiffs.

2. The challenge to the impugned order is on the ground that the Learned Single Judge erred in not considering the fact that in the suit for specific performance of a contract which was arrived at on the basis of telephonic conversation, the cause of action for filing the suit arises when the acceptance of the agreement is communicated to the proposer and secondly that when the question of territorial jurisdiction is raised while seeking revocation of the leave granted under Clause XII of the Letters Patent, the appropriate procedure in terms of the Code of Civil Procedure has to be followed which would include an opportunity to the party to lead evidence in support

of the rival contentions.

3. Few facts relevant for the decision are that the original plaintiff No.1 was resident of Mumbai and the respondent/original defendant No.1 was carrying on business in real estate, building construction and estate development in partnership as also the original defendant No.2. It is the case of the appellants that the respondent held out to the appellants that she was absolutely and exclusively entitled to full ownership of the first and second floors of the building constructed and situated on Plot No.134, Block 205-C known as 5 Babar Road, New Delhi, and that she had developed the said property in collaboration and partnership with Satija Builders and Financiers Pvt. Ltd. As the appellants were looking for a flat in a good area near Supreme Court in New Delhi, the original plaintiff No.1 on 17th February, 1995 through a broker Subhash Vig along with Raj Kumar Chawla visited the suit flat on which occasion the respondent was introduced as the owner of the flat. After inspection of the flat, having known the price of the flat and necessary modalities for completion of the deal, the original plaintiff No.1 informed the respondent that his two sons would be interested in purchasing the flat in equal shares. Having obtained

the telephone numbers of the respondent, the original plaintiff No.1 assured her that he would let her know as to whether he would be interested in purchasing the flat once he reaches Bombay. On 23rd February, 1993, the appellants decided to purchase the said flat and the original plaintiff No.1 from his residence at Mumbai had telephonic conversation with the respondent, who was at the relevant time at New Delhi, and offered to purchase a flat for Rs.9 lakhs with the earnest money of Rs.50,000/- (Fifty Thousand) and the said deal was to be completed by 30th April, 1993. On the same occasion, the respondent instantaneously communicated to the appellants, who were at the relevant time in Mumbai, her acceptance of the said deal stating that it was final and done. On conclusion of the oral contract to purchase the suit flat, the original plaintiff No.1 on 24th February, 1993 proceeded to New Delhi and paid a sum of Rs.54,000/- to her. The original plaintiff No.1 along with him had carried a typed receipt to be obtained from the respondent as regards the proof of payment. After having read the typed receipt, one Shri Sharma, who was introduced to the original plaintiff No.1 as the partner of the respondent in her building construction, made various changes in his handwriting in a typed receipt and due to several changes in the

typed receipt, the respondent informed the original plaintiff No.1 that she would dictate and get prepared a totally new receipt and accordingly a stamp-cum-memo was prepared and then signed by the respondent and handed over to the original plaintiff No.1.

4. On account of failure to comply with the obligation on the part of the respondent under the said oral agreement, a suit came to be filed for specific performance of the said agreement in this Court, and in that regard leave was granted in terms of Clause XII of the Letters Patent on 17th November, 1995 to the original plaintiff No.1. Pursuant thereto, Chamber Summons No.1670 of 1997 was taken out for revoking the said leave.

5. The Learned Single Judge, after hearing the parties, held that leave under Clause XII of the Letters Patent was obtained ex parte and was granted on a representation that the oral agreement for sale was concluded by telephonic conversation while the plaintiff was at Mumbai and that the respondent gave consent to the said agreement in the course of such telephonic conversation but the respondent having denied these claims, it cannot be held that there was any concluded agreement between the parties, besides

that the receipt on which reliance was placed by the original plaintiff No.1 does not show any agreement was concluded between the parties on telephone at Mumbai and revoked the leave granted under Clause XII of the Letters Patent. While revoking the leave, the Learned Single Judge also rejected the contention on behalf of the original plaintiffs that unless an opportunity is given to the plaintiffs to prove that the agreement had concluded in the course of telephonic conversation while the plaintiff was at Mumbai to be proved by leading evidence, the leave could not have been revoked.

6. Placing reliance in the decisions in the matter of **Bhagwandas Goverdhandas Kedia v. M/s.Girdharilal Parshottamdas & Co. & Ors.,** reported in (1966)1 SCR 656 = AIR 1966 SC 543, **Firm Kanhaiyalal v. Dineshchandra,** reported in AIR 1959 Madhya Pradesh 234, **Entores Ltd. v. Miles Far East Corporation,** reported in 1955(2) All England Law Reports 493, and **ICICI Limited, Mumbai v. Sri Durga Bansal Fertilizers Ltd. & Ors.,** reported in 1999(3) Mh.L.J. 20 submitted that the law on the point that the agreement arrived at in the course of telephonic conversation stands concluded at the place of communication of the acceptance to the plaintiff by the defendant is well

settled and the same has been totally ignored by the Learned Single Judge while passing the impugned order. She further submitted that it is also settled law that when the party seeks revocation of the leave granted under Clause XII of the Letters Patent, the parties are entitled to lead evidence in support of their rival contentions and unless such opportunity is given, leave granted under Clause XII could not have been revoked. In the case in hand, it is not in dispute that the parties were not given opportunity to lead evidence before passing the impugned order.

7. Undisputedly, the appellants approached the Court for specific performance of an oral agreement stated to have been arrived at and concluded on communication of acceptance of an offer made by the plaintiffs to the defendant and that such communication was received from the defendant by the plaintiff while the later was at Mumbai. Undisputedly, based on these facts, the suit for specific performance of the oral contract had been filed and the leave was obtained.

8. It is true that the respondent in the Chamber Summons taken out for revocation of the leave granted under Clause XII of the Letters Patent has sought to

dispute the contents of the plaint and the contention on the part of the appellants that the agreement was concluded at Mumbai or that the acceptance was communicated at Mumbai. It is also true that the receipt on which reliance is placed in support of payment of earnest money does not disclose that the agreement was concluded between the parties on acceptance being communicated by telephonic conversation at Mumbai. However, fact remains that at the time when the leave was granted the contentions which were sought to be raised on behalf of the appellants and the averments in support of those contentions in the pleadings clearly disclosed assertion on the part of the appellants that there was a telephonic conversation between the parties and the offer made by the appellants was accepted by the respondent and acceptance was communicated telephonically to the appellants at Mumbai. Once on acceptance of these facts the leave was granted, if the Learned Single Judge on the basis of the chamber summons taken out for revocation of the leave granted on the ground that the contentions of the appellants in that regard were not proved, obviously, the procedure known to law ought to have been followed to before revoking the said leave.

9. The Division Bench of this Court in **ICICI Limited's case (supra)** has clearly ruled that:-

> "when question about the territorial jurisdiction is raised either in an application seeking revocation of leave under Clause XII of the Letters Patent or on an application under section 9-A of the Code of Civil Procedure, the appropriate procedure to follow is to finally decide the said question by giving opportunity to the parties, if facts and circumstances of the case so require, to leave evidence. Such a course would avoid multiplicity of proceedings and would also be in consonance with the provisions of section 9-A and/or Order XIV, Rule 2 of the Code of Civil Procedure and Clause XII of the Letters Patent. It would also avoid examination of the same question twice over."

The law therefore on the aspect of the procedure to be followed in case of application for revocation of the leave granted under Clause XII of the Letters Patent is well settled by the said decision of a Division Bench of this Court in **ICICI Limited's case (supra).**

10. In the case in hand, it is not in dispute that the appellants had contended before the Learned Single Judge that the appellants could be given opportunity to establish the issue regarding territorial jurisdiction of this Court to deal with the matter, inasmuch as that it was clearly asserted by the appellants that the agreement was concluded on communication of acceptance of the offer made to the plaintiffs by the defendant in the course of telephonic conversation while the appellants were at Mumbai at the relevant time. In the absence of any opportunity stated to have been given to the appellants in this regard, the impugned order cannot be sustained on that ground alone and the same is liable to be set aside.

11. It is also to be noted that the point of territorial jurisdiction in relation to the agreement concluded by telephonic conversation is also well settled by the decision of the Apex Court in **Bhagwandas Goverdhandas Kedia's case (supra)**. The majority decision in the said case clearly ruled that:-

> "Obviously the draftsman of the Indian Contract Act did not envisage use of the

telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule which regards a contract as contemplated only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is inapplicable.

. The Trial Court was therefore right in the view which it has taken that a part of the cause of action arose within the jurisdiction of the City Civil Court, Ahmedabad, where acceptance was communicated by telephone to the plaintiffs."

12. In the said case, it was a case of the plaintiffs that the cause of action for the suit arose at Ahmedabad, because the defendants had offered to sell cotton seed cake which offer was accepted by the plaintiffs at Ahmedabad. Whereas, it was the case of the defendants that the plaintiffs had by a message communicated by telephone offered to purchase cotton seed cake and the defendants accepted the offer at Khamgaon and therefore no part of the cause of action for the suit had arisen within the territorial jurisdiction of the City Civil Court at Ahmedabad. The contention was negatived by the Trial Court and the said view was confirmed by the Apex Court.

13. The Learned Single Judge of the Madhya Pradesh High Court in **Firm Kanhaiyalal's case (supra)**, while dealing with the scope of Section 4 of the Contract Act, 1872, held that the same no doubt says that the communication of an acceptance is complete as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor, and as against the acceptor it is complete when it comes to the knowledge of the proposer. But it is obvious from the very language used in S.4 about the completion of the communication

of an acceptance that those provisions can have no applicability where the parties negotiate a contract in the presence of each other or over telephone. It was further held that the object of Sections 4 and 6 is to fix the point of time at which either party negotiating the contract is precluded from changing his mind. When the parties negotiate a contract face to face or over telephone, no question of revocation can possibly arise for in such instantaneous communications a definite offer is made and accepted at one and the same time.

14. As already observed above, the Learned Single Judge has neither considered the pleadings and the materials on record nor had given opportunity to the parties to lead evidence in support of their rival contentions before revoking the leave which was granted under Clause XII of the Letters Patent. Taking into consideration the law laid down by the Apex Court in **Bhagwandas Goverdhandas Kedia's case (supra)** and applying the same to the plea raised in the plaint about the oral contract having been concluded on communication of the acceptance to the plaintiffs at Mumbai, there was no material which could justify revocation of the leave granted under Clause XII of the Letters Patent in the absence of

parties leading evidence and establishing the issue regarding the territorial jurisdiction. Taking into consideration the decision of the Division Bench in **ICICI Limited's case (supra)**, the impugned order is therefore liable to be set aside.

15. The appeal, therefore, succeeds. The impugned order is hereby set aside and the matter is remanded to the Learned Single Judge to consider the chamber summons in accordance with the provisions of law taking into consideration the observations hereinabove as well as the law laid down in the decisions referred to above.

16. There shall be no order as to costs.

(R.M.S.KHANDEPARKAR, J)

(D.G.KARNIK, J)